CLIMATE CHANGE AND THE VOICELESS

Future generations, wildlife, and natural resources – collectively referred to as "the voiceless" in this work – are the most vulnerable and least equipped populations to protect themselves from the impacts of global climate change. While domestic and international law protections are beginning to recognize rights and responsibilities that apply to the voiceless community, these legal developments have yet to be pursued in a collective manner and have not been considered together in the context of climate change and climate justice. In *Climate Change and the Voiceless*, Randall S. Abate identifies the common vulnerabilities of the voiceless in the Anthropocene era and demonstrates how the law, by incorporating principles of sustainable development, can evolve to protect their interests more effectively. This work should be read by anyone interested in how the law can be employed to mitigate the effects of climate change on those who stand to lose the most.

Randall S. Abate is the inaugural Rechnitz Family and Urban Coast Institute Endowed Chair in Marine and Environmental Law and Policy, and Professor in the Department of Political Science and Sociology at Monmouth University. Professor Abate has taught at six US law schools over the course of twenty-four years. He also has taught international and comparative law courses – and delivered invited lectures – on environmental and animal law on six continents. He has published five books and thirty articles and book chapters on environmental and animal law topics.

Climate Change and the Voiceless

PROTECTING FUTURE GENERATIONS, WILDLIFE, AND NATURAL RESOURCES

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For my granddaughter, Vera, and the environmental stewards in her generation and in generations yet to come.

Contents

About the Author

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Professor Abate teaches courses in domestic and international environmental law, constitutional law, and animal law. He has taught international and comparative law courses – and delivered lectures – on environmental and animal law topics in Argentina, Australia, Brazil, Canada, the Cayman Islands, China, Colombia, India, Kenya, Kyrgyzstan, the Netherlands, Serbia, South Africa, South Korea, Spain, Turkey, the United Kingdom, and Vanuatu. In April 2013, he taught a Climate Change Law and Justice course at the National Law Academy in Odessa, Ukraine on a Fulbright Specialist grant. From 2016 to 2018, he delivered invited lectures on climate justice and animal law topics at several of the top law schools in the world including Harvard University, University of Cambridge, University of Oxford, Yale University, the University of Pennsylvania, the University of Melbourne, the University of Sydney, King's College London, and Seoul National University.

Professor Abate has published more than thirty law journal articles and book chapters on environmental law topics, with a recent emphasis on climate change law and justice. He is the editor of *Climate Justice: Case Studies in Global and Regional Governance Challenges* (ELI Press, 2016), *What Can Animal Law Learn from Environmental Law?* (ELI Press, 2015), and *Climate Change Impacts on*

Ocean and Coastal Law: U.S. and International Perspectives (Oxford University Press, 2015), and coeditor of *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013). Early in his career, he handled environmental law matters at two law firms in Manhattan. He holds a BA from the University of Rochester and a JD and MSEL (Environmental Law and Policy) from Vermont Law School.

Preface

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[1]

These famous words from Justice Douglas in his oft-quoted dissenting opinion in the US Supreme Court case, *Sierra Club* v. *Morton*, provided the foundation for the burgeoning field of environmental standing that unfolded in its wake and helped galvanize the ambitious and effective environmental protection movement in the United States in the 1970s. Nevertheless, despite decades of success in implementing and enforcing federal environmental laws in the United States, Justice Douglas's vision in this dissenting opinion for an ecocentric paradigm of environmental regulation (i.e., one that focuses on protecting the intrinsic value of nature rather than focusing on nature's value to humans) has not yet been realized. His message regarding the need for our legal system to recognize, amplify, and heed the interests of nature is more relevant and more necessary than ever today in the Anthropocene[2] era.

[1] Sierra Club v. Morton, 405 U.S. 727, 749–50 (1972) (Douglas, J., dissenting).

[2] The term "Anthropocene era" was coined as a reference point in environmental and geological history at approximately the turn of the twenty-first century to describe the time period in which humankind now finds itself. This is a time in the history of the planet during which humankind has "caused mass extinction of plant and animal species through pollution and destruction of land, oceans, and the atmosphere" through our resource-intensive and consumption-driven lifestyles in the industrial and technological era of the past century. *See* Joseph Stromberg, *What Is the Anthropocene and Are We in It?* Smithsonian.com (Jan. 2013), https://www.smithsonianmag.com/science-nature/what-is-the-anthropocene-and-are-we-in-it-164801414/.

Climate change is the defining social, political, and legal issue of this century. Climate change regulation began with mitigation strategies, and these efforts remain an important and polarizing dimension of the climate change regulation debate. Within the past decade, however, climate change adaptation issues have posed daunting regulatory challenges from environmental and human rights perspectives. The need to implement effective climate change adaptation measures is an urgent political, economic, and legal concern in developed and developing nations alike. Climate adaptation challenges pose the gravest threat to climate justice communities throughout the world – those whose vulnerability causes them to be disproportionately affected by climate change impacts – such as low-lying island nations, indigenous communities in the Arctic, and low-income and minority communities that lack the resources and infrastructure to adapt effectively to climate change impacts.

In addition to the vulnerable climate justice communities that face climate adaptation challenges in the Anthropocene era, there are three populations in the global community that are most vulnerable and least equipped to protect themselves. These categories – collectively referred to as "the voiceless" in this book – include future generations,[3] wildlife, and natural resources. Domestic and international legal principles and initiatives are beginning to recognize rights and responsibilities that apply to the voiceless community; however, these protections have yet to be pursued across all three communities of the voiceless and have not been considered collectively in the context of climate change and climate justice. This book seeks to identify the common vulnerabilities of the voiceless and how the law can evolve to protect their interests more effectively in the face of climate change impacts.

Three themes apply to the collective protection of the voiceless in the Anthropocene era. First, these populations are similarly impacted by climate change in a manner that the law overlooks and that requires application of stewardship principles inherent in the public trust doctrine and in constitutional mandates in a growing number of countries. Second, their common vulnerability underscores the need for a new rights-based legal regime to respond to climate adaptation challenges. Third, recent developments in atmospheric trust litigation, rights-based litigation for protection of wildlife, and legislative initiatives conferring legal personhood rights to natural resources make the time right for this book. Each category has made progress in an independent yet piecemeal manner in limited contexts in recent years, but more coordinated and broad-scale efforts are necessary.

[3] For purposes of this book, the term "future generations" includes today's children and unborn children of the future. These populations share the common vulnerability of inheriting a planet plagued by the climate change crisis and relying on unsatisfactory existing regulatory strategies to protect themselves from environmental catastrophe.

This stewardship-focused and rights-based revolution will face significant challenges in the years ahead, primarily because it represents a departure from the successful but inflexible and outmoded command-and-control paradigm of environmental regulation that has been in place since the 1970s. Another challenge in ushering in this new regulatory model is striking a balance between anthropogenic stewardship and ecocentric legal personhood as mechanisms of legal protection. To achieve this balance, this book proposes a continuum of common but differentiated rights. Given how different categories of humans have different degrees of rights-based protections (individuals vs. corporations, adults vs. children, etc.), and how developed and developing countries bear different responsibilities to manage climate change impacts, a continuum of rights-based protections for future generations, wildlife, and natural resources can be implemented based on capacity for stewardship. In this regard, future generations of humans should have the most rights and responsibilities. They should have a positive right to inherit a stable climate as future climate stewards.[4] Positive rights are accompanied by responsibilities that only humans can bear. By contrast, wildlife and natural resources should have negative rights-based protections. For wildlife, this would entail the right to be free from abuse and unlawful confinement, and for natural resources (and some forms of wildlife), it would involve a right to be free from unsustainable use.

There are several reasons why this rights-based paradigm is necessary now. First, the failures of traditional international environmental governance are more apparent than ever. After more than a decade of efforts to incorporate human rights language into the international climate change treaty regime, the Paris Agreement and its limited reference to human rights in the preamble of the agreement underscores the urgency to bypass the gridlock of traditional international treaty diplomacy to create a rights-based approach outside of that framework. By contrast, domestic courts and legislatures have offered significant promise to advance a rights-based approach.

Second, the command-and-control paradigm of environmental regulation is not adequate to address the problem of climate change. That regulatory model was widely employed in the first two decades of climate regulation at the domestic and international levels with a focus on climate mitigation. When it became apparent that climate mitigation efforts would not be able to halt and reverse climate change impacts, the focus of climate change regulation shifted to adaptation. With the shift to adaptation, rights-based considerations emerged and the field of climate justice was born.

[4] This argument draws on the visionary language from the district court's decision in the *Juliana v. United States*. Drawing on the logic of the *Obergefell v. Hodges* that found constitutional protection for same-sex marriage, the court noted that a stable climate, like marriage, is an essential platform for the enjoyment of all other rights. This analysis will be explored in depth in Chapter 3 of the book.

The arsenal of federal environmental statutes in the 1970s in the United States was an effective regulatory system to address the domestic air, water, and land-based pollution crises. By contrast, climate change is a global problem with planetary implications that must draw on a more potent tool box of legal mechanisms. Recent legislative developments in legal personhood protections for natural resources, similar efforts in the courts for wildlife, and atmospheric trust litigation for future generations are important steps in this paradigm shift. Atmospheric trust litigation in the United States and abroad may be the tipping point for this legal revolution.

Third, the need for meaningful action is urgent. The sixth mass extinction that scientists predict may arrive this century is not just another episode of "the strong will survive and we will see who remains" transition, because it threatens the viability of humans as stewards of ecosystems. Climate change magnifies the natural and unnatural threats to ecosystems and puts the earth on a collision course with eco-catastrophe. Every crisis is an opportunity, however. Climate change threatens to decimate the earth and it threatens to do so quickly as a "threat multiplier" with critical "tipping points"[5] in the near future. Yet the urgency of this pending eco-catastrophe could be the impetus to transform our legal system to respond effectively with rights-based legal mechanisms for the voiceless.

Fourth, in promoting this paradigm shift toward enhanced stewardship duties and rights-based protections, this effort can capitalize on the momentum from recent legal victories in protecting the common vulnerability of marginalized climate justice communities. Climate change regulation is already starting to be perceived and applied as a human rights and justice issue, which has enabled marginalized climate justice populations like indigenous peoples to secure procedural and substantive protections in the climate change impacts context. Moreover, international human rights law has embraced the connection between climate change and human rights in UN resolutions and through the work of a special rapporteur on human rights and the environment. The progress made and lessons learned from protecting the *vulnerable* can serve as a valuable foundation on which to advance the effort to protect the *voiceless*. The voiceless community is just starting to see legal protections and advocates for their cause. Earlier calls for their protection were limited to academic discourse in foundational and groundbreaking works by Edith Brown Weiss,[6] Christopher Stone,[7] and Peter Singer.[8] The forward

[5] "Tipping points" in the scientific literature indicate that the international community's window of opportunity for meaningful action on global climate change is closing rapidly. The IPCC 1.5°C Assessment Report from October 2018 projected that the global community has approximately twelve years remaining to meet its targets from the Paris Agreement, after which all we can do is brace for climate change impacts and do our best to adapt.

[6] Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (1989).

[7] Christopher D. Stone, Should Trees Have Standing? Law, Morality, and the Environment (3d ed. 2010).

[8] Peter Singer, Animal Liberation (1975).

thinking on these issues from decades past now has an opportunity to take root as a response to the climate change crisis and as an extension of the law's effort to protect the vulnerable from climate change impacts. The time has come to implement those prescient visions for protection of the voiceless.

It is no longer a matter of whether this legal revolution will occur, but only a matter of when and how. The environmental management paradigm of the twentieth century is not sustainable. Striking examples of this reality are how the maximum sustainable yield model of fisheries management contributed to the collapse of global fisheries and the multiple use and sustained yield model of forest management similarly facilitated the demise of once-abundant forests in the United States. In both of these contexts, regulatory models are shifting to preservation-based strategies, such as marine and terrestrial protected areas to replace the (un)sustainable use model. These preservation-oriented approaches reflect the growing recognition of the intrinsic ecosystem value of these resources, irrespective of their value for human consumption.

Rights and responsibilities should offer a mix of benefits and burdens to those who hold them. The most common argument opposing the recognition of legal personhood rights for wildlife is that they are unable to bear human responsibilities. Yet those human responsibilities are not being fully engaged by humans in their relationship to wildlife and natural resources. Human responsibility means little if it is not exercised at least in part for the benefit of the vulnerable and voiceless. Unfortunately, human "responsibility" toward the voiceless has been to abuse the right to develop and seek economic gain in a manner that jeopardizes the sustainability of wildlife and natural resources. Efforts in the US in the past three decades to roll back the ambitious scope of protections for wildlife and natural resources under the Endangered Species Act (ESA) are a prime example of this clash between stewardship objectives and anthropocentric economic development values. The ESA is controversial by design because it is among the few environmental statutes that do not place human needs and objectives first. A new stewardship ethic of eco-responsibility is needed to protect all living entities' right to sustain themselves on the earth as a potent weapon in the struggle to endure in the face of the environmental and human rights impacts of the Anthropocene era.

The timing is right for this volume given the recent "perfect storm" of legal developments in these three voiceless communities. The Nonhuman Rights Project's legal personhood cases on behalf of primates and mammals have garnered national and international attention; legislative and judicial developments in legal personhood for natural resources in the United States and abroad have been in the headlines regularly in the past year; and the *Juliana* case, building on a longstanding tradition of protection of future generations, has been dubbed the "environmental trial of the century" as it works its way through multiple procedural challenges in US federal courts. These developments in the protection of the voiceless provide a

valuable foundation on which to develop a stewardship-focused and rights-based approach to climate change adaptation.

This book seeks to make several unique contributions. First, it unites these three categories of the voiceless for the first time in a single legal analysis by highlighting and underscoring common and synergistic recent legal developments across these categories. Second, it uses climate change impacts and regulation as a unifying theme to protect the shared vulnerability that these communities face in the Anthropocene era. Third, it proposes enhanced governmental stewardship duties coupled with a rights-based framework for the protection of these communities in the Anthropocene era. Finally, this book offers valuable insights derived from interviews with lawyers working on some of the leading judicial developments on these topics in the United States and around the world.

The philosopher George Berkeley is famous (if not infamous) for his dialogue regarding perception of trees in a park[9]: "But, say you, surely there is nothing easier than for me to imagine trees, for instance, in a park . . . and nobody by to perceive them."[10] To which Berkeley responds, "The objects of sense exist only when they are perceived . . . the trees therefore are in the garden no longer than while there is someone by to perceive them."[11] This book's premise is a proposed emergency antidote to the anthropocentric perspective of nature reflected in Berkeley's dialogue. This view is the underlying cause of our global environmental crisis. Thinking of wildlife and nature as existing only through human perception objectifies these intrinsically valuable beings and resources as commodities for human consumption and development. This anthropocentric mindset has severed the ecosystem ties that unite us and has alienated us from our ancestors and successors in the human race. Failure to conserve wildlife and nature represents a failure to exercise our moral (and hopefully soon-to-be legal) duty to serve as stewards of the environment for the benefit of future generations.

[9] *See* George Berkeley, A Treatise Concerning the Principles of Human Knowledge (1734).
[10] *Id.* at Section 23.
[11] *Id.* at Section 45.

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